

**UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF NEW HAMPSHIRE**

Nicholaus Samora

v.

Civil No. 07-cv-079-PB

Angela Poulin, et al.¹

O R D E R

Nicholaus Samora, a New Hampshire State prisoner proceeding pro se and in forma pauperis, has filed a complaint pursuant to 42 U.S.C. § 1983, alleging that the defendants to this action, employees of the New Hampshire Department of Corrections ("DOC"), have retaliated against him for exercising his First Amendment rights. The matter is before me for preliminary review to determine whether or not the complaint states a claim upon which relief might be granted. United States District Court for the District of New Hampshire Local Rule ("LR") 4.3(d)(2). For the reasons stated herein, I find that the complaint does state a

¹Samora names the following defendants to this action: Angela Poulin, Media Generalist for the Northern New Hampshire Correctional Facility ("NCF"), NCF Hearings Officer Fortier (first name unknown), NCF Major Dennis Cox, NCF Warden Larry Blaisdell, and New Hampshire Department of Corrections Assistant Commissioner Christopher Kench.

claim upon which relief might be granted and I direct that it be served on the defendants.

Standard of Review

Under this Court's local rules, when an incarcerated plaintiff commences an action pro se and in forma pauperis, the magistrate judge is directed to conduct a preliminary review and to prepare a report and recommendation determining whether the complaint or any portion thereof should be dismissed because:

- (i) the allegation of poverty is untrue, the action is frivolous, malicious, or fails to state a claim upon which relief may be granted, or seeks monetary relief from a defendant who is immune from such relief under 28 U.S.C. § 1915A(b); or
- (ii) it fails to establish subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1).

LR 4.3(d)(2). In conducting the preliminary review, the Court construes pro se pleadings liberally. See Ayala Serrano v. Lebron Gonzales, 909 F.2d 8, 15 (1st Cir. 1990) (following Estelle v. Gamble, 429 U.S. 97, 106 (1976) to construe pro se pleadings liberally in favor of the pro se party). "The policy behind affording pro se plaintiffs liberal interpretation is that if they present sufficient facts, the court may intuit the correct cause of action, even if it was imperfectly pled." Ahmed

v. Rosenblatt, 118 F.3d 886, 890 (1st Cir. 1997), cert. denied, Ahmed v. Greenwood, 522 U.S. 1148 (1998).

At this preliminary stage of review, all factual assertions made by the plaintiff and inferences reasonably drawn therefrom must be accepted as true. See Aulson v. Blanchard, 83 F.3d 1, 3 (1st Cir. 1996) (stating the “failure to state a claim” standard of review and explaining that all “well-pleaded factual averments,” not bald assertions, must be accepted as true). This review ensures that pro se pleadings are given fair and meaningful consideration. See Eveland v. Dir. of C.I.A., 843 F.2d 46, 49 (1st Cir. 1988).

Background

On January 12, 2007, Samora prepared an affidavit for fellow DOC inmate Harvey Pratt, in support of Pratt’s pending federal district court lawsuit.² The affidavit included several documents attached to it as exhibits, and was to be used as evidence in Pratt’s lawsuit. Pratt asked defendant Poulin to copy the affidavit and attached documents. Poulin, noting that the attachments to the affidavit were Samora’s property, filed a disciplinary report on January 29, 2007, charging Samora with

²See Pratt v. Stephen J. Curry, Commissioner, N.H. Dep’t of Corrs., Civ. No. 05-cv-367-SM (D.N.H.).

loaning property to Pratt in violation of DOC policy. At a disciplinary hearing held before defendant Fortier on February 6, 2007, Samora defended himself on the grounds that the affidavit and attachments thereto had been provided to Pratt in support of Pratt's pending lawsuit, as truthful testimonial evidence to be used in that action. Fortier found Samora guilty of a disciplinary violation for providing the materials in question to Pratt without first obtaining permission from an appropriate NCF official to do so.

Samora immediately appealed the guilty finding to defendant Cox. Cox requested that Samora meet with him to discuss the appeal. During that meeting, held on February 7, 2007, Samora presented defendant Cox with copies of two documents previously issued by this Court. The first document was an Order issued in the case of Tom Cossette v. Angela Poulin, et al., Civ. No. 06-cv-347-JD, 2006 WL 3751206 (D.N.H. Dec. 18, 2006), finding that inmates have a First Amendment right to present truthful testimony in a lawsuit, and that taking adverse action against an inmate for exercising that right constitutes unconstitutional retaliation. The second document was a Report and Recommendation issued in Pratt's case on June 8, 2006, finding that the DOC

policy prohibiting the copying of any document "that involves other inmates,"³ such as an affidavit supplied in support of a lawsuit, without the approval of the warden, is an overbroad and invalid response to legitimate penological objectives. According to Samora's complaint, Cox responded by calling the previous rulings of this Court "crap," and stating that he would not follow any order of this Court unless that order was directed at Cox personally. Cox denied Samora's appeal. Samora then appealed the guilty disciplinary finding to defendants Blaisdell and Kench, who, apparently relying on PPD 7.42, both denied Samora's appeal, on the grounds that Samora needed prior approval of the NCF Warden in order to provide an affidavit to another inmate.

Discussion

I. Section 1983 Claims⁴

Section 1983 creates a cause of action against those who, acting under color of State law, violate federal constitutional

³DOC Policy and Procedure Directive ("PPD") 7.42 generally prohibits the photocopying of documents "that involve other inmates." See PPD 7.42, IV(B)(2).

⁴The claims as identified herein will be considered for all purposes to be the claims raised in the complaint. If Samora disagrees with this identification of the claims, he must do so by properly moving to amend his complaint.

or statutory law. See 42 U.S.C. § 1983;⁵ Parratt v. Taylor, 451 U.S. 527, 535 (1981) (overruled on other grounds by Daniels v. Williams, 474 U.S. 327, 330-331 (1986)); Wilson v. Town of Mendon, 294 F.3d 1, 6 (1st Cir. 2002). In order for a defendant to be held liable under § 1983, his or her conduct must have caused the alleged constitutional or statutory deprivation. See Monell v. Dep't of Soc. Servs., 436 U.S. 658, 692 (1978); Soto v. Flores, 103 F.3d 1056, 1061-62 (1st Cir.), cert. denied, 522 U.S. 819 (1997).

II. Retaliation Claim

Samora alleges that the disciplinary action taken against him constituted unconstitutional retaliation for the exercise of his First Amendment rights. Conduct on the part of prison officials that is "not otherwise constitutionally deficient is actionable under § 1983 if done in retaliation for the exercise

⁵42 U.S.C. § 1983 provides that:

Every person who under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law

of constitutionally protected first amendment freedoms."

Oropallo v. Parrish, No. 93-1953, at *3, 1994 WL 168519 (D.N.H. May 5, 1994), aff'd, 23 F.3d 394 (1st Cir. 1994) (citing Ferranti v. Moran, 618 F.2d 888, 892 n.4 (1st Cir. 1980)); see Goff v. Burton, 7 F.3d 734, 738 (8th Cir. 1993), cert. denied, 512 U.S. 1209 (1994) (prison officials cannot lawfully impose a disciplinary sanction against a prisoner in retaliation for the prisoner's exercise of his constitutional right). "[G]overnment actions, which standing alone do not violate the Constitution, may nonetheless be constitutional torts if motivated in substantial part by a desire to punish an individual for exercise of a constitutional right." Mitchell v. Horn, 318 F.3d 523, 530 (3rd Cir. 2003).

Prison officials may make policy that is reasonably related to legitimate penological interests, even at the expense of certain constitutional rights. See Beard v. Banks, ____ U.S. ___, 126 S.Ct. 2572, 2579 (2006) (citing Turner v. Safley, 482 U.S. 78, 89-90 (1987)). However, "actions otherwise supportable lose their legitimacy if designed to punish or deter an exercise of constitutional freedoms." Ferranti v. Moran, 618 F.2d 888, 892

n.4 (1st Cir. 1980) (citing McDonald v. Hall, 610 F.2d 16, 18 (1st Cir. 1979)).

In order to state a claim for retaliation for an exercise of his First Amendment rights, an inmate must allege: (1) the conduct which led to the alleged retaliation was protected by the First Amendment, (2) some adverse action at the hands of the prison officials, and (3) a causal link between the exercise of the inmate's First Amendment rights and the adverse action. Price v. Wall, 428 F. Supp. 2d 52, 55 (D.R.I. 2006); see also LaFauci v. N.H. Dep't of Corr., No. Civ. 99-597-PB, 2005 WL 419691, at *7 (D.N.H. Feb. 23, 2005) (Unpublished Order). I consider each of these elements of a retaliation claim in turn.

A. Conduct Protected by the First Amendment

1. Free Speech

The First Amendment protects an individual's right to speak freely. See U.S. Const. amend. I.⁶ Part of the free speech right of ordinary individuals is the right to testify truthfully. See Franco v. Kelly, 854 F.2d 584, 590 (2d Cir. 1988) (prisoner

⁶U.S. Const. amend. I states in relevant part:

Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

stated valid § 1983 claim for retaliation by alleging that prison officials filed false charges against him in retaliation for exercising his right to testify); see also Melton v. City of Oklahoma City, 879 F.2d 706, 714 (10th Cir. 1989) (the right to appear and give true testimony as a witness in a legal proceeding is guaranteed by the First Amendment's free speech clause), cert. denied, 502 U.S. 906 (1991); Langley v. Adams County, 987 F.2d 1473, 1479 (10th Cir. 1993) (the right to testify truthfully is protected by the First Amendment); Reeves v. Claiborne County Bd. of Educ., 828 F.2d 1096, 1100 (5th Cir. 1987) (same) (quoting Smith v. Hightower, 693 F.2d 359, 268 (5th Cir. 1982)). A written statement provided to another inmate in support of litigation against the prison has been held to be a form of free speech protected by the First Amendment. See Zarska v. Higgins, 171 Fed. Appx. 255, 257, 259 (10th Cir. 2006).

2. Petitioning the Government for Redress of Grievances/Maintaining Right of Access to the Courts

The right to petition the government for a redress of grievances has been characterized as "among the most precious of the liberties safeguarded by the Bill of Rights." United Mine Workers v. Ill. State Bar Ass'n, 389 U.S. 217, 222 (1967). In

the prison context, this right means that inmates must be "permit[ted] free and uninhibited access . . . to both administrative and judicial forums for the purpose of seeking redress of grievances against state officers." Sostre v. McGinnis, 442 F.2d 178, 200 (2d Cir. 1971) (en banc), cert. denied, Sostre v. Oswald, 404 U.S. 1049 & Oswald v. Sostre, 405 U.S. 978 (1972). The First Amendment protects an individual's freedom of speech in both oral and written form. See U.S. Const. amend. I; Palmigiano v. Travisono, 317 F. Supp. 776, 786 (D.R.I. 1970) (recognizing that the First Amendment's protection extends to written correspondence to public officials seeking to redress grievances or protest injustices).

Under the Due Process Clause of the Fourteenth Amendment, prison inmates enjoy a right of access to the courts. See Bounds v. Smith, 430 U.S. 817, 828 (1977)⁷; Lewis v. Casey, 518 U.S. 343,

⁷The right of access to the Courts in the prisoner context has been limited to certain types of lawsuits. See Thaddeus-X v. Blatter, 175 F.3d 378, 391 (6th Cir. 1999) (limiting a prisoner's right to access the courts to direct appeals, habeas petitions, and civil rights claims taken on prisoner's own behalf). Here, however, I find that the lawsuit filed by Pratt sufficiently alleges unconstitutional conditions of confinement, that Pratt's right of access to the courts to litigate such a suit includes Samora's right to participate therein. See Johnson v. Avery, 393 U.S. 483, 490 (1969) (plaintiff prisoner has standing to press claim under § 1983 for interference with plaintiff's right to assist another inmate in effecting the other inmate's right to

350-51 (1996). States have an affirmative duty to ensure that inmates have meaningful access to the courts. Id. at 832-34; Wolff v. McDonnell, 418 U.S. 539 (1974), Johnson v. Avery, 393 U.S. 483 (1969); Germany v. Vance, 868 F.2d 9, 14 (1st Cir. 1989) (internal quotations omitted). A prisoner's right to access the courts has been held to encompass the right to testify as a non-party witness in a lawsuit. Gay v. Shannon, No. Civ.A. 02-4693, 2005 WL 756731, *8 (E.D.Pa. Mar. 1, 2005) ("[The Third Circuit] has recognized the right [to testify as a non-party witness] exists for members of the general population and it should be extended to an inmate unless his confinement requires otherwise.") (citing Green v. Phila. Hous. Auth., 105 F.3d 881, 886 (3d Cir. 1997), Worrell v. Henry, 219 F.3d 1197 (10th Cir. 2000), and Smith v. Hightower, 693 F.2d 359, 368 (5th Cir. 1982) for the proposition that the First Amendment protects a non-party witness' right to testify truthfully at trial).

Samora has alleged that he exercised his First Amendment free speech right and right to petition the government for a redress of grievances by making and providing another inmate with

petition for the redress of grievances); McDonald, 610 F.2d at 19 (same); Haymes v. Montanye, 547 F.2d 188, 191 (2d Cir. 1976) (same), cert. denied, 431 U.S. 967 (1977).

a written affidavit constituting his truthful testimony in support of the other inmate's pending federal civil rights lawsuit. I find that Samora has sufficiently alleged that his written statement was both speech entitled to the protection of the First Amendment, and a petition to the government to redress grievances protected by the First Amendment. Accordingly, I find that Samora has alleged a First Amendment right sufficient to meet the first requirement for stating a retaliation claim.

B. Adverse Action

To state an adverse action, plaintiff must allege that the defendants subjected him to "conduct that would deter a similarly situated individual of ordinary firmness from exercising his or her Constitutional rights." Dawes v. Walker, 239 F.3d 489, 492 (2d Cir. 2001), overruled in part on other grounds by Phelps v. Kapnolas, 308 F.3d 180, 187 n.6 (2d Cir. 2002); see Thaddeus-X v. Blatter, 175 F.3d 378, 398 (6th cir. 1999). Even if an inmate is not chilled in his expression, he may still state a claim for retaliation if it is arguable that the retaliatory behavior alleged is sufficient and of the type to deter an ordinary person from exercising his rights. Gay, 2005 WL 756731, *8 (citing Allah v. Seiverling, 229 F.3d 220, 225 (3d Cir. 2000)). Samora

alleges that the defendants initiated disciplinary proceedings against him, found that he had committed a disciplinary infraction, and imposed a sanction of ten hours of extra duty, and ten days loss of canteen that was suspended for ninety days. While the penalties imposed here were not extreme, there is no doubt that, to an inmate of ordinary firmness, the bringing of disciplinary charges, findings of guilty, and potential sanctions are negative actions with important implications for both the quality of an inmate's institutional life, and the potential for an inmate to minimize the length of his prison stay by earning parole. Further, it is reasonable to conclude that inmates faced with potential penalties for supplying testimony to support another inmate's lawsuit would likely choose not to assist another inmate in order to minimize negative consequences to himself. Samora, therefore, has stated sufficient facts to allege that adverse actions were taken against him that would chill an ordinary inmate in Samora's situation from exercising his First Amendment right to provide an affidavit to another inmate.

Of course, prison administrators may make rules and regulations that curtail the constitutional rights of inmates if

those rules are reasonably related to legitimate penological interests. Turner, 482 U.S. at 89. The same reasoning has been applied to actions taken by prison officials that curtail constitutional rights. See Beauchamp v. Murphy, 37 F.3d 700, 711 (1st Cir. 1994), cert. denied, 514 U.S. 1019 (1995). Here, the regulation in question requires that all inmates who wish to make a copy of any document that relates in any way to another inmate seek prior approval from the NCF warden, who will determine whether or not the inmate's request is "legitimate" prior to granting or denying permission for the copy to be made. I have already found, and the State of New Hampshire has already conceded, that this rule is overbroad and prevents inmates from receiving copies of documents to which they are entitled. See Pratt v. N.H. Dep't of Corrs., No. Civ. 05-cv-367-SM, 2006 WL 1644620, at *3 (D.N.H. June 8, 2006) (Unpublished Order). My Report and Recommendation on this matter was written a full seven months prior to the events alleged in this case and was specifically brought to the attention of the defendants named here, and none of them chose to apply this Court's findings in that matter to Samora's virtually identical situation. Accordingly, Samora has easily stated sufficient facts to

demonstrate that an adverse action was taken against him in response to the exercise of his First Amendment rights, and that the action was not taken pursuant to a regulation that reasonably effects any legitimate penological objective.

C. Retaliatory Action Caused by First Amendment Violation

Circumstantial evidence is often enough to support a claim that an adverse action was taken with retaliatory intent, as intentions are often difficult to prove through direct evidence. Beauchamp, 37 F.3d at 711; Ferranti, 618 F.2d at 892 (chronology of events provided support for inference of retaliation), McDonald, 610 F.2d at 18 (same); see also Woods v. Smith, 60 F.3d 1161, 1166 (5th Cir. 1995), cert. denied, Palermo v. Woods, 516 U.S. 1084 (1996). Here, Samora alleges that shortly after Poulin was asked to make a copy of an affidavit supporting an inmate lawsuit that had implications for Poulin's conduct, an action Poulin likely perceived as potentially contrary to her legal interests, that Poulin wrote a disciplinary report charging Samora with loaning the paperwork in question to another inmate. The lawsuit that Samora was assisting also named Cox and Blaisdell, defendants here, as defendants to that action. Samora was charged with and found guilty of violating prison regulations

in due course. Samora took every appeal available to him and was denied relief, despite the fact that each defendant named was well aware of the legal and factual evidence supporting Samora's position. This sequence of events presents sufficient evidence of an adverse act specifically taken in response to Samora's exercise of his First Amendment rights to meet the third requirement for a retaliation claim. Accordingly, I find that Samora has stated a retaliation claim upon which relief may be granted, and I direct that this action be served on the defendants named in the complaint.

III. Supervisory Liability Claims

"Supervisory liability under § 1983 cannot be predicated on a respondeat [superior] theory, but only on the basis of the supervisor's own acts or omissions." Aponte Matos v. Toledo Davila, 135 F.3d 182, 192 (1st Cir. 1998) (internal citations omitted). A supervisor, to be liable for the acts of those who serve underneath him, "either was a primary actor involved in, or a prime mover behind, the underlying violation." Camilo-Robles v. Zapata, 175 F.3d 41, 43-44 (1st Cir. 1999). There must be "an affirmative link, whether through direct participation or through

conduct that amounts to condonation or tacit authorization" to the violation alleged. Id. at 44.

Samora has named Cox, Blaisdell, and Kench as defendants to this action in their supervisory capacities. Samora bases his allegation of supervisory liability on the fact that, through Samora's grievances and appeals, the supervisory defendants were aware of the violation of Samora's constitutional rights, and yet they failed to remedy the situation. Instead, the supervisory defendants implicitly approved and supported the deprivation of Samora's First Amendment rights caused by Poulin and Fortier. Samora has, therefore, sufficiently alleged that Cox, Blaisdell, and Kench were responsible for the retaliation alleged, and I direct that the claims in this case be served against those defendants in their individual supervisory capacities.

Conclusion

As I find that plaintiff has stated a claim upon which relief may be granted, I order the complaint (document no. 1) be served on Defendants. The Clerk's office is directed to serve the New Hampshire Office of the Attorney General ("AG's office"), as provided in the Agreement On Acceptance Of Service, copies of this order and the complaint (document no. 1). See LR

4.3(d)(2)(C). Within thirty days from receipt of these materials, the AG's office will submit to the court an Acceptance of Service notice specifying those defendants who have authorized the AG's office to receive service on their behalf. When the Acceptance of Service is filed, service will be deemed made on the last day of the thirty-day period.

As to those defendants who do not authorize the AG's office to receive service on their behalf or whom the AG's office declines to represent, the AG's office shall, within thirty days from receipt of the aforementioned materials, provide a separate list of the last known addresses of such defendants. The Clerk's office is instructed to complete service on these individuals by sending to them, by certified mail, return receipt requested, copies of these same documents.

Defendants are instructed to answer or otherwise plead within twenty days of acceptance of service. See Fed. R. Civ. P. 12(a)(1)(A).

Plaintiff is instructed that all future pleadings, written motions, notices, or similar papers shall be served directly on

the Defendants by delivering or mailing the materials to them or their attorneys, pursuant to Fed. R. Civ. P. 5(b).

SO ORDERED.



James R. Muirhead
United States Magistrate Judge

Date: May 8, 2007

cc: Nicholaus Samora, pro se